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Attorney for Plaintiff, JOSHUA ASSIEFF

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSHUA ASSIFF.

Plaintiff,

v.

**COUNTY OF LOS ANGELES;
SHERIFF DEPUTY BADGE
NUMBER 404532;
And DOES 1 through 10.**

Defendants

Case No. 2:22-cv-05367 RGK (MAAx)

OBJECTIONS TO DEFENDANT'S PROPOSED JURY INSTRUCTIONS

Action Filed: August 3, 2022

Pretrial Conference: July 10, 2023

Trial Date: July 25, 2023

Assigned to: Hon. R. Gary Klausner,
District Judge, Courtroom 850

Plaintiff, JOSHUA ASSIFF (hereinafter “Plaintiff”) hereby respectfully submits the following objections to Defendant’s [Proposed] Jury Instructions [Docket # 96] and Defendant’s Further [Proposed] Jury Instructions [Docket # 97].

Defendant's [Proposed] Jury Instructions [Docket # 96]:

DEFENDANT'S PROPOSED INSTRUCTION, 9.2 CAUSATION:

Defendant proposes this instruction, but the instruction is empty. Defendant just provides an incomplete copy of the comments sections from the Ninth Circuit

1 approved instructions, deleting the important section on supervisor liability. The
2 instruction, which Defendant failed to provide, should read as follows:

3 **9.2 Causation**

4 Plaintiff Joshua Assiff must show that Defendant Sergeant Kelly deprived
5 plaintiff of his Constitutional rights, and that deprivation of his Constitutional rights
6 was a substantial factor in causing Plaintiff Joshua Assiff's harm.

7 Defendant Sergeant Kelly deprived Plaintiff Joshua Kelly of his
8 Constitutional rights if Defendant Sergeant Kelly does an affirmative act,
9 participates in another's affirmative act, or omits to perform an act which he is
10 legally required to do that causes the deprivation of plaintiff's Constitutional rights.

11 Defendant Sergeant Kelly deprived Plaintiff Joshua Kelly of his
12 Constitutional Rights as a supervisor if Defendant Sergeant Kelly:

13 (1) was personally involved in the constitutional deprivation;
14 (2) there is a sufficient causal connection between Defendant Sergeant
15 Kelly's wrongful conduct and the constitutional violation;

16 (3) Defendant Sergeant Kelly set in motion a series of acts by others that
17 resulted in the deprivation of plaintiff's Constitutional rights, or

18 (4) Defendant Sergeant Kelly acquiesced in plaintiff's constitutional
19 deprivation by his subordinates.

20 A substantial factor in causing harm is a factor that a reasonable person
21 would consider to have contributed to the harm. It must be more than a remote or
22 trivial factor. It does not have to be the only cause of the harm.

23 Conduct is not a substantial factor in causing harm if the same harm would
24 have occurred without that conduct.

25 [Comments 9.2, CACI 430, *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011) see
26 also *OSU Student All. v. Ray*, 699 F.3d 1053, 1076 (9th Cir. 2012)]

1 **DEFENDANT'S PROPOSED INSTRUCTION, 9.21 TERRY STOP:**

2 Plaintiff is not asserting a claim against Defendant for a stop without reasonable
3 suspicion. This instruction is inapplicable, unnecessary, and will confuse the jury.

4

5 **DEFENDANT'S PROPOSED INSTRUCTION, 9.34 QUALIFIED**
6 **IMMUNITY:**

7 Again, Defendant proposes this instruction, but the instruction is empty. Defendant
8 just provides a copy of the comments sections. This instruction is unnecessary as the
9 question of Qualified Immunity is one for the Court, not the jury.

10

11 **DEFENDANT'S PROPOSED SPECIAL INSTRUCTION NO. 1**

12 Unnecessary and confusing, 9.23 defines probable cause.

13

14 **DEFENDANT'S PROPOSED SPECIAL INSTRUCTION NO. 2**

15 Unnecessary and confusing, 9.23 defines probable cause.

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17 **DEFENDANT'S PROPOSED SPECIAL INSTRUCTION NO. 3**

18 Unnecessary and confusing, 9.25 defines reasonable force.

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20 **DEFENDANT'S PROPOSED SPECIAL INSTRUCTION NO. 4**

21 Unnecessary and confusing, investigatory stop is not at issue, 9.25 defines reasonable
22 force.

23

24 **DEFENDANT'S PROPOSED SPECIAL INSTRUCTION NO. 5**

25 Unnecessary and confusing, 9.25 defines reasonable force.

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27 **DEFENDANT'S PROPOSED SPECIAL INSTRUCTION NO. 6**

28 Unnecessary and confusing, 9.25 defines reasonable force.

1 **Defendant's Further [Proposed] Jury Instructions [Docket # 97]:**

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3 **DEFENDANT'S PROPOSED INSTRUCTION, 1.5 CLAIMS AND DEFENSES:**

4 Defendant's proposed instruction contains improper defenses: 1) Defendant's
5 First Affirmative Defense is not a defense, it is just a denial of Plaintiff's claim;
6 2) Defendant's Second Affirmative Defense (Qualified Immunity) is a question for
7 the Court, not the jury. It's inclusion in this instruction is unnecessary, improper and
8 will just confuse the jury; 3) Defendant's Third, Fifth, and Sixth Affirmative
9 Defenses are not defenses to Plaintiff's claims. This is not a negligence claim. This
10 is an intentional tort. There is no contributory negligence on a 1983 claim; and
11 4) Defendant's Seventh Affirmative Defense (Probable Cause) is again not a defense,
12 it is just a denial of Plaintiff's claim. The inclusion of these improper defenses will
13 confuse the jury. This instruction should read as follows:

14 **1.5 Claims and Defenses**

15 To help you follow the evidence, I will give you a brief summary of the
16 positions of the parties:

17 The Plaintiff Joshua Assiff asserts that Defendant Sergeant Kelly violated
18 plaintiff's Constitutional rights by wrongfully arresting plaintiff and arresting
19 plaintiff with excessive force. The plaintiff has the burden of proving these claims.

20 Defendant Sergeant Kelly denies those claims and also asserts the following
21 affirmative defense: Failure to mitigate: Defendant Sergeant Kelly asserts that
22 Plaintiff has failed, in whole or in part, to mitigate his damages. Plaintiff had a duty
23 to use reasonable efforts to mitigate his alleged damages.

24 Defendant Sergeant Kelly has the burden of proof on his affirmative defense.

25 Plaintiff Joshua Assiff denies Defendant's affirmative defense.

DEFENDANT'S PROPOSED INSTRUCTION, 9.25 EXCESSIVE FORCE:

In the twelfth element for the jury to consider, the Defendants changed the Ninth Circuit approved language from “emotionally disturbed” to “emotionally distressed and/or disturbed” The instruction should read as follows:

9.25 Particular Rights—Fourth Amendment—Unreasonable Seizure of Person—Excessive Force

In general, a seizure of a person is unreasonable under the Fourth Amendment if a police officer uses excessive force in making a lawful arrest and/or in defending himself or another and/or in attempting to overcome the resistance of a noncompliant suspect. Therefore, to establish an unreasonable seizure in this case, the plaintiff must prove by a preponderance of the evidence that Defendant Sergeant Kelly used excessive force.

Under the Fourth Amendment, a police officer may use only such force as is “objectively reasonable” under all of the circumstances. You must judge the reasonableness of a particular use of force from the perspective of a reasonable officer on the scene and not with the 20/20 vision of hindsight. Although the facts known to the officer are relevant to your inquiry, an officer’s subjective intent or motive is not relevant to your inquiry.

In determining whether the officer used excessive force in this case, consider all of the circumstances known to the officer on the scene, including:

- (1) the nature of the crime or other circumstances known to Defendant Sergeant Kelly at the time force was applied;
- (2) whether the plaintiff posed an immediate threat to the safety of Defendant Sergeant Kelly or to others;
- (3) whether the plaintiff was actively resisting arrest or attempting to evade arrest by flight;

- (4) the amount of time Defendant Sergeant Kelly had to determine the type and amount of force that reasonably appeared necessary, and any changing circumstances during that period;
- (5) the relationship between the need for the use of force and the amount of force used;
- (6) the extent of the plaintiff's injury;
- (7) any effort made by the officer to temper or to limit the amount of force;
- (8) the severity of the security problem at issue;
- (9) the availability of alternative methods to take the plaintiff into custody and/or to subdue the plaintiff;
- (10) the number of lives at risk (motorists, pedestrians, police officers) and the parties' relative culpability; *i.e.*, which party created the dangerous situation, and which party is more innocent;
- (11) whether it was practical for Defendant Sergeant Kelly to give warning of the imminent use of force, and whether such warning was given;
- (12) whether it should have been apparent to Defendant Sergeant Kelly that the person he used force against was emotionally disturbed; and
- (13) whether a reasonable officer would have or should have accurately perceived a mistaken fact.

“Probable cause” exists when, under all of the circumstances known to the officer[s] at the time, an objectively reasonable police officer would conclude there is a fair probability that the plaintiff has committed or was committing a crime.

1 DATED: July 3rd, 2023

The Law Office Of Thomas M. Ferlauto, APC

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4 By: 

5 Thomas M. Ferlauto

6 Attorney For: Plaintiff, JOSHUA ASSIFF

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